

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

PENNSYLVANIA STATE
CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth, *et al.*,

Defendants

and

REPUBLICAN NATIONAL
COMMITTEE, *et al.*,

Intervenor-Defendants

Case No. 1:22-cv-00339-SPB

**MEMORANDUM REGARDING THE STATUS OF THE PENDING
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Pursuant to the Court's September 3, 2024 Order (ECF No. 454), Plaintiffs respectfully submit this Memorandum addressing the impact of the Pennsylvania Commonwealth Court's decision in *Black Political Empowerment Project v. Schmidt*, 2024 WL 400321 (Pa. Commw. Ct. Aug. 30, 2024) ("*B-PEP*").

Before this Court are fully briefed cross-motions for summary judgment on Plaintiffs' federal constitutional claims challenging the practice of excluding Pennsylvania mail ballot voters based on a trivial, undisputedly irrelevant error in filling out the date on the mail ballot envelope. *See, e.g.*, ECF Nos. 400, 401, 402, 449 (Plaintiffs' motion and supporting briefs); *see also, e.g.*, ECF No. 444 (Plaintiffs' omnibus opposition to Defendants' cross-motions). In *B-PEP*, meanwhile, the

Commonwealth Court held that the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5, prohibits the exclusion of Pennsylvania mail ballot voters based on the irrelevant envelope-date errors at issue here. 2024 WL 400321, at *1–*2, *34.

GOP Intervenors, who also intervened in *B-PEP*, immediately appealed Commonwealth Court’s decision to the Supreme Court of Pennsylvania. *Black Pol. Emp. Project, et al. v. Schmidt, et al.*, Pa. No. 68 MAP 2024. In addition to their merits arguments, GOP Intervenors have made a number of procedural arguments in *B-PEP*, including arguing that Commonwealth Court lacked original jurisdiction, as well as arguments regarding standing and joinder of indispensable parties. Moreover, notwithstanding that *B-PEP* arises entirely under state law, GOP Intervenors have suggested that federal law somehow precludes Pennsylvania courts from enforcing the requirements of the Pennsylvania Constitution. While this suggestion is meritless—as are the GOP Intervenors’ other procedural arguments—it raises the prospect that GOP Intervenors will at least attempt some further appeal to the United States Supreme Court if their pending appeal to the Supreme Court of Pennsylvania is unsuccessful.

GOP Intervenors’ appeal to the Supreme Court of Pennsylvania is now fully briefed and the Court has indicated it will decide the matter without argument.

The Commonwealth Court’s ruling protects voters from being needlessly disenfranchised in the 2024 election due to irrelevant mistakes in dating the form on the mail ballot envelope. That ruling, unless stayed or reversed, could obviate the

need for injunctive relief from this Court as to the 2024 election, and if finally affirmed by the Supreme Court of Pennsylvania could potentially resolve this case on alternate, state law grounds.

At this time, however, neither the outcome nor timing of the *B-PEP* litigation is certain. In light of the ongoing appeal in *B-PEP*, Plaintiffs remain at risk that the envelope-date rule will be enforced to disenfranchise voters absent relief from this Court. Plaintiffs therefore ask this Court to rule on the pending cross-motions in order to ensure the protection of their federal constitutional rights.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted.

Dated: September 13, 2024

Stephen Loney (PA 202535)
Marian K. Schneider (PA 50337)
AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
sloney@aclupa.org
mschneider@aclupa.org

Witold J. Walczak (PA 62976)
AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222
Tel: (412) 681-7736
vwalczak@aclupa.org
rting@aclupa.org

David Newmann (PA 82401)
Brittany C. Armour (PA 324455)
HOGAN LOVELLS US LLP
1735 Market Street, 23rd Floor
Philadelphia, PA 19103
Tel: (267) 675-4610
david.newmann@hoganlovells.com
brittany.armour@hoganlovells.com

Respectfully submitted,

/s/ Ari J. Savitzky
Ari J. Savitzky
Megan C. Keenan
Sophia Lin Lakin
Adriel I. Cepeda Derieux
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
asavitzky@aclu.org
mkeenana@aclu.org
slakin@aclu.org
acepedaderieux@aclu.org

*Counsel for the Pennsylvania State
Conference of the NAACP, League of
Women Voters of Pennsylvania,
Philadelphians Organized to Witness,
Empower and Rebuild, Common Cause
Pennsylvania, Black Political
Empowerment Project, Make the Road
Pennsylvania, Barry M. Seastead,
Marlene G. Gutierrez, Aynne Margaret
Pleban Polinski, Joel Bencan, and
Laurence M. Smith*

CERTIFICATE OF SERVICE

I hereby certify that, on the date set forth below, I caused a true and correct copy of the foregoing Memorandum to be served via the Court's electronic filing system upon all counsel of record.

Dated: September 13, 2024

Respectfully submitted,

/s/ Ari J. Savitzky
Ari J. Savitzky

Counsel for Plaintiffs